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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP - 9 2005

Federal Communications Commission
Office of Secretary

FLORIDA CABLE
TELECOMMUNICATIONS ASSOCIATION,
INC., COX COMMUNICATIONS GULF
COAST, L.L.C., *et. al.*

Complainants,

v.

GULF POWER COMPANY,

Respondent.

E.B. Docket No. 04-381

To: Office of the Secretary

Attn: The Honorable Richard L. Sippel
Chief Administrative Law Judge

**COMPLAINANTS' MOTION FOR LEAVE TO FILE REPLY WITH
ACCOMPANYING REPLY TO GULF POWER COMPANY'S RESPONSE
TO COMPLAINANTS' SECOND MOTION TO COMPEL**

The Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., and Bright House Networks, LLC ("Complainants"), by their attorneys and pursuant to 47 C.F.R. § 1.325(a)(2), respectfully request leave to file the following reply to Respondent Gulf Power Company's ("Gulf Power") Response ("Response") to Complainants' Motion to Compel (1) Gulf Power's Production of Documents Needed by Complainants to Prepare for the Hearing, and (2) Further Responses to Interrogatories as to Which the Presiding Judge Previously Required Supplemental Responses ("Second Motion to Compel"). Complainants' Reply should be considered because it both responds to the assertion by Gulf Power that Complainants have not complied with the August 5, 2005 Discovery Order ("Discovery Order") and because it provides

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directly relevant legal citations concerning the inadequacy of non-specific responses to document requests. Respondent and the Bureau staff have no objection to Complainants' motion, but Respondent advised that it wishes to reserve the right to comment on this Reply.

REPLY

The Discovery Order required Complainants to address, the following three points in any new motion to compel: (1) discussion of a "narrowed request for further documents" with counsel for Gulf Power; (2) limitation of any motion to compel to documents "that are likely to be used in deposition and/or at hearing, and/or that are needed for testifying experts to formulate opinions"; and (3) inspection of "documents offered for inspection by Gulf Power." Discovery Order, 21.

Complainants addressed each of these three points in the "Background" section to their Second Motion to Compel. Complainants first explained that, prior to serving their Second Set of Document Requests, they had conferred with counsel for Gulf Power. *See* Second Motion to Compel, 2. Complainants next explained that they had informed counsel for Gulf Power that they would be limiting the new document requests to the *Alabama Power* requirements¹ and Gulf Power's claims in its Description of Evidence, matters clearly relevant to both depositions and hearing. *Id.* Finally, Complainants cited to the Discovery Order's ordering clauses and explained that, because Gulf Power had not met the predicate requirement of responding to Complainants' discovery requests by actually *identifying* specific documents, or even specific locations, offices, files, and document numbers or titles, Complainants could not fairly be expected to "search through unspecified Gulf Power documents to find the documents Gulf asserts are the ones it was relying upon when it filed its 'Description of Evidence' and made its claims in this proceeding." *Id.*, 3. It is this last point that warrants clarification.

¹ *Alabama Cable Telecommunications Ass'n v. Alabama Power Co.*, 311 F.3d 1357 (11th Cir. 2002) ("Alabama Power").

The key point about Gulf Power's responses to Complainants' Second Set of Document Requests is that Gulf Power never has identified specific documents, although such identification is required as a matter of law. For example, Request No.1 asked Gulf Power to identify (specifying by Bates number) documents "in which Gulf Power was unable to accommodate additional attachments, either by third parties or by Gulf Power itself, on poles already containing Complainants' attachments." See Second Motion to Compel, 3. Gulf Power didn't identify any specific documents, or even files at specific locations, in response to this request that Complainants could inspect or review. Instead, Gulf Power simply used the broad term of "make-ready documents" and suggested that such documents had already been "made available for inspection." But which make-ready documents? Gulf Power used the same exact response – that Complainants might find documents they were looking for in unspecified "make-ready documents" – in answer to nearly all of the document requests that are the subject of Complainants' Second Motion to Compel. If Complainants had requested Gulf to produce "all make-ready documents" without limitation, Gulf's response would have some validity. But Complainants' requests were not so framed.

Given the specificity of Complainants' requests, such broad-brush, "go-find-it-yourself" responses to document requests are not permissible. Federal courts, when interpreting the corresponding federal Rule of Civil Procedure 34, have routinely held that a "response that 'documents responsive to this request have been produced previously as part of [the party's] Fed. R. Civ. P. 26 disclosures' does not comply with Rule 34(b)." *Allianz Insurance Co. v. Surface Specialities*, No. 03-2470-CM-DJW, 2005 U.S. Dist. LeXIS 301 (D. Kan. Jan. 7, 2005). Unless the responding party provides actual responsive documents and attests that such documents "were produced as they are kept in the usual course of business," the responding party "is required to identify the particular documents or to organize and label them to correspond to each request." *Id.*

at *9. See also *Middle Market Financial Corp., v. D'Orazio*, No. 96-Civ. 8138 (SWK)(HBP), 1997 U.S. Dist. LEXIS 22944 at *3 (S.D.N.Y. July 11, 1997)(“there is no reason why defendants should not be required to either specifically identify and produce the responsive documents or state that no responsive documents exist. Any other result would transmogrify discovery into a game of cat and mouse”).² Clearly not *all* the make-ready documents in the file cabinets are responsive.

In its Response, Gulf Power argues that it has provided sufficient detail, referring generally to make-ready documents at “Engineering & Construction offices” and “work order files.” But the point is that even this response, which was not included in response to the document requests themselves, does not identify the documents upon which Gulf Power relies, or intends to rely, for the contention that it was unable to accommodate additional attachments in Request No. 1 (or, for that matter, the documents alleged to be responsive to request numbers 2, 4, 5, 6, 7, 12, and 15). Indeed, Gulf notes that there are “eleven Engineering & Construction offices,” but fails to specify which documents, at which offices, it is relying upon. During Complainants’ counsel’s trip to Pensacola, Florida on May 27-28, 2005, Gulf’s counsel did offer to provide access to multiple file cabinets in multiple offices, but that meant Complainants would have to review every document in those files to determine if any might be what Gulf was relying on previously or would rely on in this proceeding. That would shift the burden of determining what documents and information Gulf contends supports its claims to the Complainants. Gulf has never said that all the documents in those files are truly “responsive.” If that was Gulf’s intent, and Gulf has not itself reviewed all the documents in those files, then there is a larger problem with all of Gulf’s discovery responses.

Significantly, the *Alabama Power* standard in this case requires a pole-by-pole showing. Gulf Power’s burden to identify responsive documents must therefore be viewed in the context of

² Gulf Power was also ordered to “itemize” the evidence it already provided. *Discovery Order*, 6. That itemization, filed August 31, did nothing more to assist in determining what documents were used in “describing” its evidence.

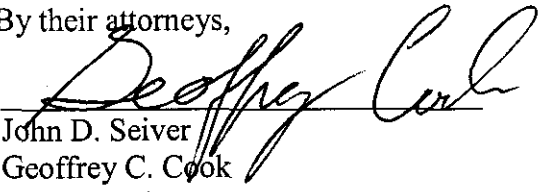
its requirement to identify specific instances, involving specific poles, where it could not accommodate additional attachers. It did not meet this burden when it responded to Complainants' Second Set of Document Requests that were narrowed specifically as the Court directed. Ultimately, if Gulf Power had identified specific pages, or even specific files at a particular location, Complainants could have inspected and reviewed them prior to filing the Second Motion to Compel, but in the absence of such basic identifying information, Gulf Power had not met its predicate responsibility of responding to Complainants' document requests.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Complainants' Second Motion to Compel, Complainants respectfully request that the Court accept this Reply and enter an Order compelling Respondent to respond fully to Complainants discovery requests, and award such other relief as is just.

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September 9, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, *Complainants' Motion for Leave to File a Reply, With Accompanying Reply to Gulf Power's Response to Complainants' Second Motion to Compel*, has been served upon the following by electronic mail and U.S. Mail on this the 9th day of September, 2005:

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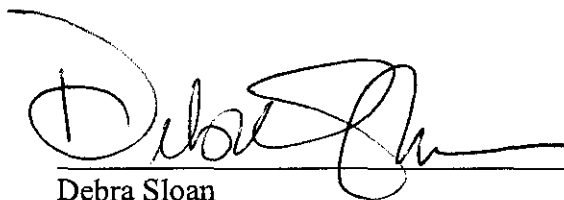
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